

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN**

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JOHN L. ALLEN,

Plaintiff,

Case No. 05-C-975

v.

MATTHEW FRANK, Secretary,  
Department of Corrections,  
PHIL KINGSTON, Former Warden,  
CCI, DR. JIM GARITI, M.D., Divine  
Savior Hospital, BUNI KUMAPAYI,  
R.N., M.S., DR. MARK A. KLIEWER,  
Staff Radiologist, DR. FREDERICK  
KELCZ, Staff Radiologist, CLARK  
SCHUMACHER, Fellow Resident,  
SEAN SHANNAHAN, Fellow Resident,  
PATRICIA SIEDSCHLAG, Manager,  
HSU, CCI, ANN SEMROW, Manager,  
HSU, CCI, DR. GARY BRIDGEWATER,  
Medical Doctor, CCI, JAMES GREER,  
Director, Bureau of Health Services,  
RICK RAEMISCH, Officer, OOS, CCI,  
CINDY O'DONNELL, Officer, OOS, CCI,  
JOHN RAY, Complaint Examiner, DOC,  
SANDRA HAUTAMAKI, Complaint  
Examiner, DOC, WILLIAM NOLAND, ICE,  
Review System, CCI, CYNTHIA THORPE,  
ICE, Review System, CCI, MICHELLE  
ALBRECHT, ICE, Review System, CCI,  
AMY MILLARD, ICE, Review System, CCI,  
NANCY HAHNISCH, R.N., CCI,  
PAUL PERSSON, R.N., CCI, STEVE  
HELGERSON, R.N., CCI, DAVE DITTER,  
Unit Manager, CCI, and MIKE MARSHALL,  
Social Worker, CCI,

Defendants.

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## **OPINION AND ORDER**

Plaintiff John Allen, a prisoner in state custody, has sued James Gariti, M.D., among others for violating his Eighth Amendment rights. Allen is seeking relief pursuant to 42 U.S.C. § 1983. Gariti has moved for summary judgment on the ground that he is not a state actor and, therefore, cannot be sued for relief under section 1983. Although Gariti provided Allen with notice of his obligation to respond to the motion, no timely response has been filed, so the court concludes that Allen has waived his right to respond. See Civil Local Rule 7.1.

In order to establish a claim under section 1983, a plaintiff must establish that: (1) the defendant was acting under color of state law; and (2) the defendant deprived the plaintiff of a right or an interest secured by the Constitution or the laws of the United States. See Jones v. Wilhelm, 425 F.3d 455, 465 (7th Cir. 2005); Payne v. Churchich, 161 F.3d 1030, 1039 (7th Cir.1998). In this case Defendant Gariti states that he is employed by Divine Savior Health Care as an emergency room physician in Portage, Wisconsin. Allen has not met his burden of showing that Gariti is a government employee or that he was acting under color of state law at the time in question. Therefore, because Allen cannot establish an element of his section 1983 claim, the court will grant summary judgment in favor of Defendant Gariti.

Accordingly, because no material facts are in dispute and the movant has shown that he is entitled to judgment as a matter of law, the court ORDERS that the "Motion for Summary Judgment on Behalf of Defendant James Gariti, M.D." (filed February 8, 2006) IS GRANTED. See Federal Rule of Civil Procedure 56(c).

IT IS FURTHER ORDERED that James Gariti, M.D. is dismissed as a party to this action.

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin, this 17th day of March, 2006.

s/ Thomas J. Curran  
Thomas J. Curran  
United States District Judge